

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Appellant,

v.

WILLIAM PIPPIN,

Respondent.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

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BRIEF OF RESPONDENT (CORRECTED)

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**A. ASSIGNMENTS OF ERROR**

The court erred in entering the following conclusion of law: "The officers had a legitimate concern for their safety." CP 41 (CL 11).

**Issues**

1. Whether the police invaded Pippin's private affairs under article I, section 7 and violated his reasonable expectation of privacy under the Fourth Amendment in looking into his enclosed, makeshift dwelling without a warrant?

2. Whether the State failed to carry its heavy burden of proving an officer safety exigency constituted an exception to the warrant requirement?

**B. STATEMENT OF THE CASE**

There was a community of homeless people living in downtown Vancouver, composed of about 80 campsites. CP 35 (FF 6); RP<sup>1</sup> 10, 12, 22. William Pippin lived in this community inside a makeshift shelter covered by tarps. CP 36 (FF 20); RP 43, 60; Ex. 1, 2. Pippin's dwelling was erected between a guardrail on a public road and a chain link fence that is private property. CP 37 (FF 23); RP 22, 27. The homeless community, including Pippin's shelter, was across the street from the

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<sup>1</sup> The verbatim report of proceedings is referenced as follows: RP - 12/1/15, 1/11/16.

Sharehouse. RP 26, 27. The Sharehouse is a social services agency that provides services to the homeless. CP 35 (FF 6); RP 27. Homeless people go the Sharehouse to eat food, take showers and do laundry. RP 27. The Sharehouse does outreach and counseling, and networks with other agencies. RP 27.

Until August 2015, a city ordinance made it unlawful to camp anywhere in the city of Vancouver without permission. CP 34 (FF 2); RP 10-11. From late August to mid-October, Vancouver's ordinance was not enforced. CP 35 (FF 3); RP 11. In mid-October, enforcement of a revised ordinance began that permitted camping from 9:30 p.m. to 6:30 a.m. CP 35 (FF 4); RP 11. Starting in October, police began notifying homeless people of the change in the law by giving verbal warnings or posting written warnings on the exterior of their shelters. CP 35 (FF 5); RP 11, 17. This was an attempt to place them elsewhere rather than arrest them. CP 35 (FF 5); RP 11-12.

There were "county health issues" raised regarding the concentration of people downtown near the Sharehouse, and concern about the environment not supporting the amount of open camping that was taking place. CP 35 (FF 10); RP 12. The owner of the fence, who operated a business, made trespass complaints about encampment structures, including Pippin's structure, being set up against the fence. CP

37 (FF 24); RP 19-20, 31. A project was put together for law enforcement to canvass the Sharehouse area. CP 35 (FF 11); RP 13. Although the ordinance outlawed camping during prohibited hours "by letter of the law," it was in the discretion of individual officers whether to arrest or warn individuals found in violation. CP 36 (FF 14); RP 14.

October 29, 2015 was the first day of the canvassing project, at which time police officers Chavers and Donaldson encountered Pippin's shelter. CP 35 (FF 12), 36 (FF 20); RP 13, 60. Officers contacted over 100 people in the course of notifying them about the ordinance. RP 22. The goal was to document individual campsites and make contact with people at each site or post a written notice if no one was present. CP 36 (FF 13); RP 13, 17. The written notice said in bright red something along the lines of "notice of health and safety." CP 36 (FF 18); RP 18. Underneath, the notice detailed the ordinances for unlawful camping and unlawful storage. CP 36 (FF 18); RP 13, 18.

The notice also said that people needed to remove their things when camping is not allowed or police or public works may come to pick them up. CP 36 (FF 18); RP 13, 18-19. Still, Officer Chavers testified it was not a notice to vacate, but rather a notice of health concern. RP 13. The written notice stated there was going to be a cleanup by the city and they needed to comply with the ordinance by not having their camps

erected after 6:30 a.m. "by the middle of following week." CP 36 (FF 17); RP 13, 18. So the notice gave occupants "a 4- or 5-day lead time to engage in services or pack up and leave or whatever they had to do." RP 13. On October 29, Chavers and Donaldson left this notice on Pippin's shelter. CP 36 (FF 20, 21); RP 60.

On November 2, Chavers and Donaldson were back in the area re-contacting people to find out if they could help and let them know they had to comply with the ordinance on that day. CP 37 (FF 25); RP 24. They told them they had to pack up and there was no grace period. CP 37 (FF 25); RP 24. Donaldson, however, testified his intent was to warn people that their property would be picked up as trash the next day. RP 60. Chavers testified his intent was to contact folks at each site to see if they were cooperative with the "outreach education warning piece of it, to do that." RP 30. If there was any kind of resistance, then it was within officer discretion to cite or arrest for unlawful camping or storage.<sup>2</sup> CP 37 (FF 26, 30); RP 30, 31.

On November 2 at about 10:35 a.m., Chavers, Donaldson and a third officer (Wolstein) went to what Chavers described as Pippin's "makeshift shelter." CP 37 (FF 29); RP 31, 43. Chavers first asked if

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<sup>2</sup> A couple of people were arrested on November 2 because they were contacted on October 29 and had not made any attempt to pack up. CP 37 (FF 27); RP 24-25.

anyone was awake inside. RP 31. There was no response. RP 31. Donaldson then rapped on Pippin's shelter, announced they were police, and asked if anyone was present. CP 38 (FF 31); RP 32-33. A "groggy" male voice said "Hello, yeah here, just waking up" or something like that. CP 38 (FF 33); RP 32, 43. Pippin sounded like someone who was just waking up or "kind of drugged." RP 33, 44. Officers asked if Pippin was alone and he said he was. CP 38 (FF 34); RP 32. Officers told Pippin he needed to come out so they could give him written notice and talk to him "about what's coming." CP 38 (FF 35); RP 32. Pippin said he would come out in a moment. CP 38 (FF 37); RP 43 64. The manner in which Pippin spoke was "slow, lethargic." CP 38 (FF 36); RP 32-33, 49. Officers Chavers and Wolstein had a conversation about something unrelated while waiting for Pippin to come out. CP 38 (FF 38); RP 33. Pippin said he was getting up. RP 32. Officers heard "a little bit of movement" under the tarp. CP 38 (FF 40); RP 33.

Officers did not initially have safety concerns but became concerned about the amount of time Pippin was taking. CP 38 (FF 41); RP 33, 34, 38. "Several seconds elapsed without [Pippin] coming out from under the tarp." CP 38 (FF 42); RP 33, 43, 48, 65.

In his written incident report, Chavers made no mention of being concerned for officer safety.<sup>3</sup> RP 44-45. Chavers testified he had a general concern about weapons based on his assumption that "all the people in that area had weapons."<sup>4</sup> CP 39 (FF 45, 46); RP 35, 47. There had been previous service calls in the area for assault and robbery. CP 39 (FF 47); RP 35. There were other service calls involving people in the area who had armed themselves with bike parts, chains, machetes, and camping implements. CP 39 (FF 48); RP 35. Officers had been warned by command at the safety briefing that morning that they should not get lax because the people they were contacting could be wanted for violent crimes. CP 39 (FF 50); RP 47.

Donaldson testified "After a short period of time with no answer from him, I heard some wrestling around inside. I, again, announced that he needed to exit the tent. He, again, did not comply with my command. At that time, I felt he might be going for a weapon." RP 62-63. Chavers had no specific information that the person in the shelter was armed, "but I wasn't going to second-guess." RP 47. Chavers explained "I assume as a police officer, so that I don't get hurt, that all people are always armed until otherwise made safe." RP 47.

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<sup>3</sup> Donaldson did not write a report. RP 63.

<sup>4</sup> Within a day or two of writing the report, a prosecutor contacted Chavers and asked if he had safety concerns. RP 49-50.

Chavers was concerned it was taking "longer than usual" for someone in the tent to open up and told Donaldson he could not see what was going on. RP 34. Donaldson announced he was going to lift the tarp up to see what Pippin was doing, and he did so. CP 39 (FF 54); RP 34. Donaldson testified once he lifted the tarp and saw Pippin's hands, "It quelled all my officer safety concerns." RP 62. Donaldson spoke with Pippin about the camping ordinance and asked if he had any questions. RP 62. As Pippin turned and stood up to get up from his bed, Chavers saw a bag of what appeared to be methamphetamine. CP 39 (FF 56); RP 36-37, 44, 62-63. As described by Chavers: "It's kind of like this sit-up and, Hey, I'm getting my pants on, you know, my shorts on, or give me a second. And then he turned and stood up." RP 37. The bag of methamphetamine was "right behind him as if he had been laying on it in his shoulder area" in the sleeping bag. RP 37-38. Pippin was arrested on the spot for having methamphetamine. RP 38, 40.

Officers did not manipulate any of Pippin's belongings other than lifting the tarp and collecting the methamphetamine. CP 40 (FF 57); RP 41, 63. Until the flap was lifted, officers could not see under the tarp. CP 40 (FF 58); RP 30, 44. Chavers had used a flashlight to try and see inside but was unsuccessful. CP 38 (FF 43); RP 34. The inside of the shelter was closed off from public view. RP 44.

The State charged Pippin with possession of methamphetamine. CP 3. Pippin's counsel filed a CrR 3.6 motion to suppress the methamphetamine as evidence, arguing the warrantless search of Pippin's shelter violated article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. CP 4-9, 14-16. The State opposed the motion, contending Pippin had no protected privacy interest or, alternatively, a "protective sweep" exception based on concern for officer safety justified lifting the flap to Pippin's shelter, at which point the methamphetamine was in plain view. CP 17-23.

The trial court concluded Pippin had a subjective and objective expectation of privacy in his temporary dwelling, citing United States v. Sandoval, 200 F.3d 659 (9th Cir. 2000). CP 40-41. Because officers did not have a search warrant and their safety concerns did not outweigh Pippin's reasonable expectation of privacy, the search was unlawful and the evidence was suppressed. CP 41. The court dismissed the charge. CP 24. The State appealed. CP 27-28, 29-33.

**C. ARGUMENT**

**1. THE WARRANTLESS INTRUSION INTO PIPPIN'S DWELLING INVADED HIS PRIVATE AFFAIRS UNDER ARTICLE I, SECTION 7 OF THE WASHINGTON CONSTITUTION.**

Police looked inside Pippin's makeshift dwelling without a warrant. The inside of that dwelling was Pippin's private affair because of the intimate information that can be there and intimate activities that can take place there. No exigent circumstance grounded in a concern for officer safety justified the warrantless intrusion. The trial court's suppression of the methamphetamine found as a result of the unconstitutional search should be affirmed.

**a. The State's challenge to certain findings of fact fails.**

The invited error doctrine "prohibits a party from setting up an error at trial and then complaining of it on appeal." State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984), overruled on other grounds by State v. Olson, 126 Wn.2d 315, 893 P.2d 629 (1995). On appeal, the State challenges findings of fact 7, 8 and 9. Brief of Appellant (BOA) at 11-13. The State proposed these findings of fact. CP 47-48. "A more perfect example of invited error cannot be imagined." Deaconess Med. Ctr. v. Dep't of Revenue, 58 Wn. App. 783, 787, 795 P.2d 146 (1990) (invited error barred party from challenging findings it proposed).

The State complains the challenged facts are not a proper subject for judicial notice. Even assuming this claim is not barred by invited error, the State failed to preserve its judicial notice argument. The failure to raise the judicial notice issue below waives the issue for appeal. State v. Newbern, 95 Wn. App. 277, 289-90, 975 P.2d 1041, review denied, 138 Wn.2d 1018, 989 P.2d 1142 (1999).

The State cites Vandercook v. Reece, where the party objected at the trial level. Vandercook v. Reece, 120 Wn. App. 647, 650-51, 86 P.3d 206 (2004). BOA at 13. Unlike Vandercook, the State lodged no objection to the court taking judicial notice of anything. The court announced at the beginning of the CrR 3.6 hearing of its observations that portable toilets were set up in the encampment area. RP 6-7. The State did not dispute the accuracy of the observation, presumably because the accuracy of the observation was indisputable. During argument on the motion, the court said it read about the portable toilets and health department concerns that 80-100 people were living there without restroom facilities: "We can all take notice it could become a health concern with defecation and urination -- so bringing porta-potties in there." RP 75. The State addressed the significance of having portable toilets there without disputing they were there. RP 75. The State waived

the judicial notice issue because the State did not object, request clarification, or dispute the factual basis for the findings below.

Furthermore, the court's findings are supported by substantial evidence. CP 35 (FF 7, 8). Substantial evidence is "a quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true." Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Some people in the community had armed themselves. RP 35. Chavers testified Sharehouse is a social service agency that works with other agencies to help the homeless. RP 12, 27. Sharehouse was right across the street from the encampment. RP 13, 26. In connection with Sharehouse, Chavers testified portable huts were donated. RP 13.

**b. Article I, section 7 of the Washington Constitution generally provides greater protection than the Fourth Amendment and focuses on qualitatively different protections.**

Absent an exception to the warrant requirement, warrantless searches are forbidden under both article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). The Fourth Amendment provides the minimum protection against unlawful searches. State v. Young, 123 Wn.2d 173, 179-80, 867 P.2d 593 (1994). Our state

constitution "clearly recognizes an individuals' right to privacy with no express limitations." Young, 123 Wn.2d at 180 (quoting State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)).

"The private affairs inquiry is broader than the Fourth Amendment's reasonable expectation of privacy inquiry." State v. Hinton, 179 Wn.2d 862, 868, 319 P.3d 9 (2014). The Washington Supreme Court has "repeatedly held the privacy protected by article I, section 7 survived where the reasonable expectation of privacy under the Fourth Amendment was destroyed." State v. Eisfeldt, 163 Wn.2d 628, 637, 185 P.3d 580 (2008). "Although they protect similar interests, 'the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.'" Eisfeldt, 163 Wn.2d at 634 (quoting State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002)). "The Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to any manner of warrantless, but reasonable searches." Id. "By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not." Id. "Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington." Id. at 635.

"When presented with arguments under both the state and federal constitutions, we start with the state constitution." Hinton, 179 Wn.2d at 868. Pippin argued the warrantless intrusion into his shelter violated both article I, section 7 and the Fourth Amendment. CP 6-9. The trial court applied both the Fourth Amendment and Article I section 7, although it primarily relied on a Ninth Circuit case decided under the Fourth Amendment. RP 92; CP 40-41. A trial court's suppression decision may be affirmed on any grounds supported by the record. State v. Ellis, 21 Wn. App. 123, 124, 584 P.2d 428 (1978). Pippin's analysis is more extensive than the trial court's. It turns first to the argument under article I, section 7.

**c. The inside of Pippin's dwelling constitutes a private affair under article I, section 7 because of the intimate information and activities intrusion can reveal.**

Article I, section 7 commands "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 analysis begins "by determining whether the action complained of constitutes a disturbance of one's private affairs." State v. Miles, 160 Wn.2d 236, 243-44, 156 P.3d 864 (2007). If the government disturbs a valid privacy interest, the second step is to determine whether "authority of law" justifies the intrusion. Miles, 160 Wn.2d at 244.

"Private affairs" protected by article I, section 7 are 'those privacy interests which citizens of this state have held, and should be entitled to

hold, safe from governmental trespass absent a warrant.'" Young, 123 Wn.2d at 181 (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). "To determine whether governmental conduct intrudes on a private affair, we look at the 'nature and extent of the information which may be obtained as a result of the government conduct' and at the historical treatment of the interest asserted." Hinton, 179 Wn.2d at 869 (quoting Miles, 160 Wn.2d at 244). Undersigned counsel has not discovered sources that bear on whether the privacy interest of homeless people has received historical protection. The focus, then, is on the extent to which a person's personal contacts, movements, associations, beliefs, and other intimate details of their lives are revealed from the type of intrusion at issue, and the extent to which the information has been voluntarily exposed to the public. State v. Jorden, 160 Wn.2d 121, 129-30, 156 P.3d 893 (2007); State v. Puapuaga, 164 Wn.2d 515, 522, 192 P.3d 360 (2008).

"Generally, one does not have a privacy interest in what is voluntarily exposed to the public." State v. Carter, 151 Wn.2d 118, 126, 85 P.3d 887 (2004). Pippin's shelter, however, was entirely enclosed. Those outside could not see inside. Chavers acknowledged the inside of the shelter was closed off from public view. RP 44. Indeed, Officer Chavers used a flashlight in an attempt to see inside but was unsuccessful. CP 38 (FF 43); RP 34; cf. State v. Rose, 128 Wn.2d 388, 400, 909 P.2d

280 (1996) (using a flashlight to look through a window at night is not a search because it is no more invasive than using natural eyesight to look through a window in daylight). Lifting the flap of the shelter was the only action that allowed officers to see what was otherwise protected from public view. CP 40 (FF 58); RP 30, 44. The opaque, enclosed nature of the shelter favors the presence of a private affair.

The nature of the property viewed is also a factor to consider in determining whether there has been an intrusion into a person's private affairs. Young, 123 Wn.2d at 183. The trial court determined it was Pippin's temporary dwelling. CP 40 (CL 5). Pippin's shelter was among a community of 80-100 people who lived in similar encampments. CP 35 (FF 6). Pippin lived among others in similar circumstances in a kind of small neighborhood. Pippin used the shelter as his home. The tarps would act to keep the rain out and otherwise protect him from the elements. Pippin had his sleeping bag inside. RP 31, 36. Police woke him up from bed when they contacted him. RP 32-33, 37-38, 43. By lifting the flap, police intruded into Pippin's makeshift home.

A person's home is generally a highly private place. Young, 123 Wn.2d at 185. "In no area is a citizen more entitled to his privacy than in his or her home." Id. "For this reason, 'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" Id.

(quoting State v. Chrisman, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)). Pippin's shelter was not a traditional home. By nature of its location and construction material, it was temporary. It wasn't made of four stout walls with sewer and electrical connections. But the structure functioned as his dwelling.<sup>5</sup>

The State would argue a temporary dwelling on public land does not have the same degree of protection as a traditional dwelling on private land. Such a position raises the question of whether there should be one standard for the rich and another for the poor. See Christopher Slobogin, The Poverty Exception to the Fourth Amendment, 55 Fla. L. Rev. 391, 401 (2003) (criticizing cases that allow Fourth Amendment protection to vary "depending on the extent to which one can afford accoutrements of wealth such as a freestanding home, fences, lawns, heavy curtains, and vision- and sound-proof doors and walls."). The homeless, i.e., those living in public spaces in makeshift dwellings, find themselves in difficult

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<sup>5</sup> See Miller v. United States, 357 U.S. 301, 307, 78 S. Ct. 1190, 2 L. Ed. 2d 1332 (1958) (addressing the "ancient adage that a man's house is his castle," quoting from a speech by William Pitt, Earl of Chatham, to Parliament in March 1763: "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter-- all his force dares not cross the threshold of the ruined tenement!").

circumstances.<sup>6</sup> They are still entitled to human dignity. They still have the right to have their private affairs protected from lawless government intrusion.

The fact that Pippin's makeshift dwelling was located on public land in violation of the camping ordinance does not affect the type of intimate information the interior of the dwelling protects from public observation. Upon accessing the interior of the shelter, officers are able to detect any number of intimate details about a person's life. The Supreme Court has held information contained in a hotel register is a private affair because it potentially reveals details of a person's associations, activities and location. Jorden, 160 Wn.2d at 129-30. That same type of information is revealed by looking into a homeless person's makeshift dwelling. The intrusion is even greater because police are able to witness first-hand what is right before their eyes, rather than inferring the presence of intimate information inside a hotel room through reliance on a registry. Peeking into a structure used as a dwelling can instantly reveal who is present there, revealing not only the person being sought but also people

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<sup>6</sup> The legislature has found "there are many causes of homelessness, including a shortage of affordable housing; a shortage of family-wage jobs which undermines housing affordability; a lack of an accessible and affordable health care system available to all who suffer from physical and mental illnesses and chemical and alcohol dependency; domestic violence; and a lack of education and job skills necessary to acquire adequate wage jobs in the economy of the twenty-first century." RCW 43.185C.005.

with whom that person associates. See id. at 130 (the information contained in a motel registry not only reveals "one's presence at the motel, it may also reveal co-guests in the room, divulging yet another person's personal or business associates."); Young, 123 Wn.2d at 183-84 (private affairs revealed by infrared surveillance of home include the number of people who may be staying at the residence on a given night).

And that association with others can be of an extremely intimate nature. A peek inside a tent with a bed can reveal people engaging in sexual relations, a quintessential private affair.<sup>7</sup> See Cowles Publ'g Co. v. State Patrol, 109 Wn.2d 712, 721, 748 P.2d 597 (1988) ("Sexual relations . . . are normally entirely private matters").

In determining whether something is a "private affair" under article I section 7, the analysis does not focus simply on what was actually

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<sup>7</sup> In Cowles, the Supreme Court addressed what constitutes "an unreasonable invasion of privacy" in relation to the Public Disclosure Act and the common law right of privacy: "Every individual has some phases of his life and his activities and some facts about himself that he does not expose to the public eye, but keeps entirely to himself or at most reveals only to his family or to close personal friends. Sexual relations, for example, are normally entirely private matters, as are family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past history that he would rather forget." Cowles, 109 Wn.2d at 721 (quoting Restatement (Second) of Torts § 652D, at 386 (1977)). Such matters encompass "the intimate details of one's personal and private life." Spokane Police Guild v. Liquor Control Bd., 112 Wn.2d 30, 38, 769 P.2d 283 (1989).

revealed during a course of investigation. Rather, analysis includes the types of information *potentially* revealed by such intrusion. Miles, 160 Wn.2d at 246-47, 252 (banking information potentially reveals sensitive personal information, including "what the citizen buys, how often, and from whom. They can disclose what political, recreational, and religious organizations a citizen supports. They potentially disclose where the citizen travels, their affiliations, reading materials, television viewing habits, financial condition, and more."); State v. Jackson, 150 Wn.2d 251, 262, 76 P.3d 217 (2003) (in holding GPS unit attached to vehicle intrudes upon private affair, recognizing sensitive information revealed by GPS could include "preferences, alignments, associations, personal ails and foibles."); State v. Samalia, 186 Wn.2d 262, 375 P.3d 1082, 1086 (2016) (holding "cell phones and the information contained therein are private affairs because they may contain intimate details about individuals' lives, which we have previously held are protected under article I, section 7.").

Belongings inside a makeshift dwelling can reveal a person's consumption habits. Books or other reading material inside can reveal political, recreational, and religious affiliations. Any kind of embarrassing activity done in the privacy of a traditional home can be done just as easily in a makeshift shelter. Looking into someone's shelter could reveal the presence of a person without clothing or in a state of undress, especially

when that person is roused from sleep. See RP 37 (As described by Chavers: "It's kind of like this sit-up and, Hey, I'm getting my pants on, you know, my shorts on, or give me a second. And then he turned and stood up."). That by itself is a private affair worthy of protection. State v. Sweeney, 56 Wn. App. 42, 49, 782 P.2d 562 (1989) (society recognizes an expectation of privacy in one's body and that exposure of "private parts" to law enforcement officials is "highly offensive"); York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) ("We cannot conceive of a more basic subject of privacy than the naked body."), cert. denied, 376 U.S. 939, 84 S. Ct. 794, 11 L. Ed. 2d 659 (1964).

Pippin was camped on public land in violation of the ordinance. The nature of that violation should be taken into account, as "society will tolerate a higher level of intrusion for a . . . higher crime than it would for a lesser crime." State v. Duncan, 146 Wn.2d 166, 177, 43 P.3d 513 (2002). Violation of the ordinance is a misdemeanor. VMC 8.22.060. Hardly the type of serious crime that invites a higher level of government intrusion than would otherwise be acceptable. The fact that the ordinance was not immediately enforced and police gave members of the homeless community a grace period further illustrates the violation at issue presented no imminent threat to public safety.

The State heavily relies on Division One's 2-1 decision in State v. Cleator, 71 Wn. App. 217, 857 P.2d 306 (1993), review denied, 123 Wn.2d 1024, 875 P.2d 635 (1994). In Cleator, police responded to a burglary report. Cleator, 71 Wn. App. at 218. An officer found a camp with a tent about 150 yards in the woods behind the burglarized house. Id. The tent was erected on city property. Id. The officer called out for the occupant but no one replied. Id. The officer lifted the flap of the tent, saw items matching the burglarized items, and seized them. Id. Cleator moved to suppress the property recovered from the tent on the grounds that he had a reasonable expectation of privacy in the tent. Id.

The majority in Cleator rejected this claim under the Fourth Amendment, reasoning most courts hold individuals have no right of privacy in a temporary shelter he wrongfully occupies on public property. Id. at 222-23. As a wrongful occupant of public land, Cleator had no reasonable expectation of privacy at the campsite under the Fourth Amendment because he had no right to remain on the property and could have been ejected at any time. Id. at 222.<sup>8</sup>

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<sup>8</sup> Pippin will address the Fourth Amendment analysis used in Cleator in the next section of this brief. The article I section 7 analysis comes first because our state constitution provides greater privacy protection than the federal constitution.

After disposing of the Fourth Amendment challenge, the Cleator court recited the general article I, section 7 standard but applied it in a cursory fashion: "No case has been cited nor has our research disclosed any authority indicating that our citizens have ever held unlimited privacy rights to property they wrongfully occupied. We hold that Officer Denevers' look into the tent and limited entry to retrieve stolen property did not unreasonably intrude into Cleator's private affairs because Cleator's personal effects were not disturbed." Cleator, 71 Wn. App. at 223. That is the entire extent of its article I, section 7 analysis.

Cleator is distinguishable from Pippin's case in some ways. The Cleator court took the totality of the circumstances into account, and one of those circumstances was that the tent was not Cleator's. Id. at 222. Here, police intruded into Pippin's shelter. In Cleator, there was an unchallenged finding that "the tent was not Cleator's home or the home of any other party." Id. at 222 n.8. In contrast, the shelter used by Pippin was his home. Cleator was not present at the time police looked inside the tent. Id. at 218. Pippin was present. Indeed, the police roused him out of bed. In deciding the Fourth of Amendment question, the Cleator court maintained Cleator's privacy expectations, to the extent they existed, were limited to his personal belongings, whereas the stolen items in plain view were not Cleator's personal belongings. Id. at 218, 222. Pippin's case

does not involve police in pursuit of a burglar and his stolen loot. The item observed by police inside Pippin's dwelling was his personal property.

That being said, the Cleator court's article I, section 7 analysis is flawed and should be rejected. This Court is free to disagree with another Court of Appeals' decision it finds unpersuasive. Grisby v. Herzog, 190 Wn. App. 786, 806-11, 362 P.3d 763 (2015). First, although the Cleator court paid lip service to the article I, section 7 standard, its application of that standard is no different than its Fourth Amendment analysis. It held that the officer's look into the tent and limited entry to retrieve stolen property "did not unreasonably intrude into Cleator's private affairs because Cleator's personal effects were not disturbed." Cleator, 71 Wn. App. at 223. Under article I, section 7, the question is not whether a given police intrusion was reasonable, but whether police intruded upon a private affair without a warrant. Eisfeldt, 163 Wn.2d at 628. Article I, section 7 "'is grounded in a broad right to privacy' and protects citizens from governmental intrusion into their private affairs without the authority of law." Hinton, 179 Wn.2d at 868 (quoting State v. Arreola, 176 Wn.2d 284, 291, 290 P.3d 983 (2012)). That distinction may not been clear back in 1993 when Cleator was decided, but it is crystal clear now.

In contradiction to established article I, section 7 case law, Cleator did not even conduct a private affairs analysis. Cleator said nothing about

the type of intimate information that can be revealed through warrantless intrusion into a tent on public land. Cleator fixated on the notion found in some Fourth Amendment cases that a wrongful occupant of public land has no reasonable expectation of privacy at the campsite because he has no right to remain on the property. Cleator, 71 Wn. App. at 222. What Cleator ignores is that the existence of intimate information that can be revealed from intrusion into a temporary dwelling does not turn on whether the dwelling is located legally on public land.

Closer to the mark is the recent unpublished decision in State v. Wyatt, noted at 187 Wn. App. 1004, 2015 WL 1816052 (2015). Wyatt was a homeless person camping illegally in a public park. Wyatt, 2015 WL 1816052 at \*1. Officers encountered Wyatt and someone with him, informed them they were camping illegally, and advised them that they had 24 hours to gather their belongings and leave the campsite. Id. Police officers later performed a warrantless search of closed containers found outside Wyatt's tent while Wyatt was away from his campsite. Id. The officers found materials used to make methamphetamine inside the containers. Id. The search resulted in Wyatt's conviction for manufacturing methamphetamine. Id. at \*2.

The Court of Appeals held the warrantless search invaded Wyatt's private affairs under article I, section 7. Id. at \*3-4. Unlike Cleator, the

Wyatt court actually conducted a private affair analysis. It relied on State v. Boland, which held garbage placed in a closed trash container left outside of a home on a curb is a private affair to be protected under article I, section 7. State v. Boland, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990). The Wyatt court reasoned Wyatt's items, like those in Boland, were in closed containers in close proximity to a residence. Id. at \*4. The temporary nature of the residence did not diminish the private nature of Wyatt's containers. Id. Like garbage left on a curb, unattended belongings in a park may be susceptible to intrusion from snoops and scavengers, but it is reasonable to believe police officers would not open and search containers associated with a campsite without a warrant. Id.

This belief was even more reasonable than in Boland because Wyatt did not discard his belongings. Id. "Garbage in a closed container set out on the curb for all to see and to be collected constitutes a private affair. Wyatt's closed containers, stored in his sequestered campsite near his tent, not put out as discarded garbage surely also constitutes a private affair under article I, section 7." Id. Notably, "the officers specifically warned Wyatt that he had 24 hours to leave the park, reinforcing Wyatt's expectation that his containers would be safe from police intrusion. An average citizen hearing that statement should be entitled to expect that he

and his possessions would not be disturbed by the officers for at least 24 hours." Id.

The trial court in Pippin's case similar concluded "[t]he fact that law enforcement was not arresting most people for violating the ordinance, but rather notifying them of the change in the law and telling them not to get caught there on a certain date lent to the defendant's expectation of privacy." CP 54 (CL 6). In fact, the notice affixed to Pippin's dwelling on October 29, 2015 was not a notice to vacate immediately. That notice informed Pippin that he had until the "middle of the following week" to leave. RP 13. October 29 was a Thursday. The "middle of next week" would have been Wednesday, November 4. Chavers testified people had a 4-5 day grace period as of October 29. RP 13. But police came back 4 days later on November 2 — before the previously announced grace period was over — and conducted the warrantless intrusion into Pippin's dwelling. As in Wyatt, the average citizen hearing his dwelling or belongings would not be disturbed for a number of days should be entitled to expect no such disturbance would occur until that period has passed.

Further, Pippin's shelter served as his dwelling but also as a container for his belongings. As a homeless person, his dwelling functioned as place to store his belongings. It would be incongruous to hold a homeless person has a privacy interest in a closed container *outside*

a tent used as a residence but no privacy interest *inside* a closed tent where property is contained. In light of Boland and Wyatt, to embrace the State's position that the police intruded upon no protected privacy interest in looking into Pippin's makeshift dwelling would mean a homeless person's dwelling should be treated as less than the garbage put out on the street. Article I, section 7 provides greater protection than that. The privacy interest in the interior of a makeshift dwelling is one that homeless people should be entitled to hold.

In determining whether the inside of Pippin's temporary dwelling is a constitutionally protected private affair, it is appropriate to take into account future ramifications on the privacy interests of others were this Court to find police invaded no private affair in this case. One factor militating against sanction of the warrantless surveillance in Young was that if infrared surveillance did not constitute a search requiring a warrant, there would be no limitation "on the government's ability to use the device on any private residence, on any particular night, even if no criminal activity is suspected." Young, 123 Wn.2d at 187. "Such unrestricted, sense-enhanced observations present a dangerous amount of police discretion. This kind of surveillance avoids the protection of a warrant issued upon probable cause by a neutral magistrate." Id.

While temporary dwellings may be less private than traditional homes by nature of being on public land rather than private property, the same danger of allowing police limitless discretion to enter such dwellings and snoop around remains. If this Court were to hold officers did not conduct a search when they looked into Pippin's dwelling, then there is nothing to stop the police from making this a routine fishing expedition, subjecting both the innocent and the guilty alike to intrusion without limitation. The homeless population in Washington is sizable. An entire category of citizens in society will be exposed to arbitrary intrusion by law enforcement and effectively disenfranchised from the right to privacy. This Court should affirm the trial court's suppression order because police violated Pippin's right to privacy under article I, section 7. This does not mean Vancouver cannot enforce its camping ordinance. It just means the government cannot intrude upon a homeless person's private affairs without a warrant.

**2. THE WARRANTLESS INTRUSION VIOLATED THE FOURTH AMENDMENT BECAUSE PIPPIN HAD A REASONABLE EXPECTATION OF PRIVACY IN THE INTERIOR OF HIS DWELLING.**

Because the article I, section 7 violation is dispositive, there is no need to engage in a Fourth Amendment analysis. See State v. Patton, 167 Wn.2d 379, 396 n.9, 219 P.3d 651 (2009) (court does not reach Fourth Amendment arguments when the article I, section 7 provides "independent and adequate state grounds" to resolve the issue). Should this Court determine otherwise, a Fourth Amendment analysis is provided. Police violated the Fourth Amendment in looking into Pippin's dwelling because he had a subjective and objectively reasonable expectation of privacy in the interior of his dwelling.

The Fourth Amendment provides that, "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated[.]" "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). "The test to determine if a person has a reasonable expectation of privacy is twofold: (1) Did the person exhibit an actual (subjective) expectation of privacy by

seeking to preserve something as private? (2) Does society recognize that expectation as reasonable?" State v. Kealey, 80 Wn. App. 162, 168, 907 P.2d 319 (1995).

The trial court relied on United States v. Sandoval, 200 F.3d 659 (9th Cir. 2000) in ruling police violated Pippin's right to privacy. CP 40-41. In Sandoval, law enforcement began an investigation into a marijuana grow operation in Idaho that led to the seizure of marijuana from sixteen growing sites. Sandoval, 200 F.3d at 660. During the seizure of one of the grows, which was located on Bureau of Land Management (BLM) land, federal agents entered a makeshift tent and found a medicine bottle bearing Sandoval's name. Id. The tent was closed on all four sides, and the bottle could not be seen from outside. Id. Sandoval was indicted on drug and conspiracy charges. Id. The trial court denied Sandoval's motion to suppress the evidence found in the tent, ruling Sandoval did not have a reasonable expectation of privacy because the tent was on BLM land. Id. The Ninth Circuit reversed, holding the warrantless search and seizure violated the Fourth Amendment. Id. at 661.

Several factors indicated Sandoval had a subjective expectation of privacy: (1) the tent was located in an area that was heavily covered by vegetation and virtually impenetrable; (2) the makeshift tent was closed on all four sides, and the bottle could not be seen from outside; (3) Sandoval

left a prescription medicine bottle inside the tent; a person who lacked a subjective expectation of privacy would likely not leave such an item lying around. Id. at 660.

Pippin's case is similar in some respects. Most importantly, like the makeshift tent in Sandoval, Pippin's makeshift dwelling was closed on all four sides and anything inside could not be seen from the outside. This by itself demonstrates a subjective expectation of privacy. Further, like the prescription bottle left in Sandoval's tent, a person who lacked a subjective expectation of privacy would likely not leave methamphetamine in his dwelling. Unlike Sandoval, Pippin did not leave that sensitive item behind while he left his dwelling. He remained with it. He slept with it under him. RP 37-38. These facts increase a subjective expectation of privacy. There is not even a hint of abandonment here. Cf. Lavan v. City of Los Angeles, 693 F.3d 1022, 1027 (9th Cir. 2012) ("The Fourth and Fourteenth Amendments protect homeless persons from government seizure and summary destruction of their unabandoned, but momentarily unattended, personal property.").

The State complains Pippin's case is not a complete facsimile of the facts in Sandoval, pointing out Pippin's dwelling was located on public land in downtown Vancouver rather than being located in an area of heavy vegetation. But not every single fact needs to be replicated from one case

for there to be a subjective expectation of privacy in another. Pippin's dwelling was not located in a virtual jungle, but its interior remained closed off from public view. That is the important thing. And it was his dwelling in which he slept — a fact that was not present in Sandoval but which increases the subjective expectation of privacy. The question is whether the defendant "took normal precautions to maintain his [or her] privacy." Kealey, 80 Wn. App. at 168 (citing Rawlings v. Kentucky, 448 U.S. 98, 105, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980)). By constructing a dwelling that the public could not see into, and by remaining in that dwelling, Pippin exhibited a subjective expectation of privacy in its interior.

Relying on Cleator and some other federal cases, the State asserts Pippin was illegally camping on public land and so forfeited any right to privacy. The government advanced the same kind of argument in Sandoval, claiming there could not be a subjective expectation of privacy because he was growing marijuana illegally and was not authorized to camp on BLM land. Id. at 660. The Ninth Circuit rejected this argument. A person does not lack a subjective expectation of privacy simply because he is engaged in illegal activity or could have expected the police to intrude on his privacy. Id. (citing United States v. Gooch, 6 F.3d 673, 677 (9th Cir. 1993) ("According to this view, no lawbreaker would have a

subjective expectation of privacy in any place because the expectation of arrest is always imminent.")); see also Lavan, 693 F.3d at 1029 ("Violation of [an ordinance] does not vitiate the Fourth Amendment's protections of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment.").

The Sandoval court also held Sandoval's expectation of privacy was objectively reasonable. Sandoval, 200 F.3d at 660. A person can have an objectively reasonable expectation of privacy in a tent on a public campground. Id. (citing Gooch, 6 F.3d at 677). Sandoval's tent was located on BLM land, not on a public campground, and it was unclear whether Sandoval had permission to be there. Id. at 660-61. But the reasonableness of Sandoval's expectation of privacy did not turn on whether he had permission to camp on public land. Id. at 661. "Such a distinction would mean that a camper who overstayed his permit in a public campground would lose his Fourth Amendment rights, while his neighbor, whose permit had not expired, would retain those rights." Id. at 661.

On the latter point, the State argues state law is to the contrary, citing a footnote in State v. Davis, 86 Wn. App. 414, 419 n.2, 937 P.2d 1110, review denied, 133 Wn.2d 1028, 950 P.2d 478 (1997). BOA at 22.

That footnote describes the general rule that an innkeeper has the right to control the premises at the expiration of a tenancy and can consent to a warrantless search by law enforcement for any belongings left behind by the departed renter. Davis, 86 Wn. App. at 419 n.2. That rule has no application here because Pippin did not leave his belongings behind. He stayed with them, inside his dwelling.

Still, the actual holding of Davis is notable. Under Davis, a motel guest has the same expectation of privacy during his tenancy as the owner or renter of a private residence and this expectation survives the expiration of the tenancy if the motel has accepted late payment or tolerated overtime stays in the past. Id. at 419. The motel had tolerated the defendant's overstay in the past and so he retained a reasonable expectation of privacy in his room at the time the police entered. Id.

Similarly, the police in Pippin's case had tolerated the "overstay" of the homeless campers near the Sharehouse. The camping ordinance had not been enforced for a period of time. And even when police started issuing notices on the subject, those living in the homeless community were still given warnings and a grace period to relocate rather than being arrested for violating the ordinance. Pippin was notified on October 29 that he had until the middle of next week to move. Under these circumstances, he retained a reasonable expectation that police would

respect his dwelling until that time period passed. Cf. State v. Dias, 62 Haw. 52, 55, 609 P.2d 637, 640 (Haw. 1980) ("Squatters' Row" had been allowed to exist by sufferance of the State for a considerable period of time and "this long acquiescence by the government has given rise to a reasonable expectation of privacy on the part of the defendants, at least with respect to the interior of the building itself.").

The State seizes on the fact in Sandoval that the defendant was never instructed to vacate or risk eviction, and the record did not establish any applicable regulations concerning use of BLM land. Id. at 661. But again, Sandoval's expectation of privacy did not turn on whether he had permission to camp on public land. Id. at 661. Simply because an individual is engaged in illegal activity does not mean that he or she forfeits an expectation of privacy. Wyatt, noted at 187 Wn. App. 1004 (citing Sandoval, 200 F.3d at 660).

The State's cites to a footnote in State v. Ellison, 172 Wn. App. 710, 725 n.8, 291 P.3d 921 (2013), review denied, 180 Wn.2d 1014, 327 P.3d 55 (2014) for the proposition that those engaged in criminal activity have a reduced expectation of privacy. BOA at 17-18. Ellison dropped that footnote in the context of explaining a person who is arrested has reduced privacy interests. Ellison, 172 Wn. App. at 725. Pippin was not

being arrested for violating the camping ordinance and Ellison has no applicability.

The State stakes its claim on Cleator. Pippin asks this Court to reject the Cleator court's flawed Fourth Amendment analysis. The two-judge majority in Cleator reduced the right to privacy to whether a squatter had the right to stay on the property on which he lived. Cleator, 71 Wn. App. at 220-21 (citing United States v. Ruckman, 806 F.2d 1471, 1472-73 (10th Cir. 1986) (no reasonable expectation of privacy in a cave from which defendant could be ejected at any time); Amezquita v. Hernandez-Colon, 518 F.2d 8, 11 (1st Cir. 1975) (no reasonable expectation of privacy on land which squatters had no right to occupy), cert. denied, 424 U.S. 916, 96 S. Ct. 1117, 47 L. Ed. 2d 321 (1976)).

Judge Baker, writing in dissent in Cleator, got it right when he wrote "While one's status as trespasser, licensee or invitee clearly has some bearing on the legitimacy of one's expectation of privacy, mechanistic application of the property-rights test has been rejected in favor of an inquiry into whether the expectation of privacy is legitimate and one that society is willing to recognize." Cleator, 71 Wn. App. at 225 (citing Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)). "[T]he Fourth Amendment protects people, not places." Katz, 389 U.S. at 351. This means "[w]hat a person knowingly exposes to

the public . . . is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. at 351-52.

Cleator and the federal cases it relied on suffer from the same analytical flaw: simplistically treating property rights as coextensive with privacy rights. See Cleator, 71 Wn. App. at 220 ("Most courts have rejected an individual's claim to a right of privacy in the temporary shelter he or she wrongfully occupies on public property."). The "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143, 99 S. Ct. 421, 430, 58 L. Ed. 2d 387 (1978) (citing Katz, 389 U.S. at 353). "[F]ailing to have a legal property right in the invaded place does not, *ipso facto*, mean that no legitimate expectation of privacy can attach to that place. If it did . . . Katz would be nonsensical, for fourth amendment protection would then, indeed, turn on a property right in the invaded place." Ruckman, 806 F.2d at 1477 (McKay, J., dissenting).

The majority in Cleator cited State v. Mooney, 218 Conn. 85, 588 A.2d 145, 152, 154 (Conn.), cert. denied, 502 U.S. 919, 112 S. Ct. 330, 116 L. Ed. 2d 270 (1991) as holding there is no reasonable expectation of

privacy "in a squatter's home under a bridge." Cleator, 71 Wn. App. at 220-21. The Cleator court's description of the Mooney decision is inaccurate and misleading. First, the "home" at issue was actually just a campsite under a bridge with no enclosed shelter. Mooney, 218 Conn. at 92. Second, the Mooney court expressly did *not* decide whether the defendant had a reasonable expectation of privacy in the bridge abutment area and so assumed for purposes of the decision he did not. Id. at 94. It did not need to reach that question because it held Mooney had a reasonable expectation of privacy in his duffel bag and cardboard box at his campsite, which was on state-owned land. Id. at 110-12.

The majority in Cleator would have done well to heed the rest of the Mooney decision, which recognized factors such as whether the defendant was a trespasser and whether the place involved was public "are, of course, relevant as helpful guides, but should not be undertaken mechanistically. They are not ends in themselves; they merely aid in evaluating the ultimate question in all fourth amendment cases—whether the defendant had a legitimate expectation of privacy, in the eyes of our society, in the area searched." Mooney, 218 Conn. at 97 (quoting Ruckman, 806 F.2d at 1476 (McKay, J., dissenting)).

The Mooney court was sensitive to the plight of the homeless in holding Mooney had an expectation of privacy in his duffel bag and

cardboard box: "The interior of those two items represented, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize its assertion as reasonable under the circumstances of this case." Id. at 112.

The Court of Appeals in Wyatt similarly held a person had a reasonable expectation of privacy in personal belongings in closed containers found adjacent to an occupied but illegal encampment. Wyatt, 2015 WL 1816052 at \*6-8. In so doing, it sided with Sandoval and rejected the Cleator court's stilted property rights analysis. Id.

If a person can have a reasonable expectation of privacy in closed containers found at a campsite on public land, then it necessarily follows that a person can have a reasonable expectation of privacy in a closed dwelling located on public land. Pippin's makeshift dwelling, closed off from public view, represented his last shred of privacy from the prying eyes of outsiders. There is room under the Fourth Amendment to protect vulnerable people in difficult circumstances from warrantless police intrusion. It comes down to decency and the sense that people unfortunate enough to live on the street in public spaces should still be treated with the dignity afforded by the right to privacy.

Under Cleator and the federal cases it relies on, "[t]he homeless are essentially unprotected from government surveillance." David Reichbach, The Home Not the Homeless: What the Fourth Amendment Has Historically Protected and Where the Law Is Going After Jones, 47 U.S.F.L. Rev. 377 (2012) (citing Ruckman). Although some courts seem unconcerned with the indignity of warrantless intrusion into the lives of homeless people living without permission on public land, this does not mean those decisions should be followed. For the reasons set forth, Pippin asks this Court to hold he had a reasonable expectation of privacy in the interior of his dwelling.

**3. THE STATE DID NOT PROVE OFFICER SAFETY CONCERNS JUSTIFIED THE WARRANTLESS INTRUSION INTO PIPPIN'S DWELLING.**

A warrantless search is a per se unconstitutional unless it falls within one of the few exceptions to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). The State carries the "heavy burden" of proving a warrantless search is justified under one of the narrowly drawn exceptions. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002).

As it did at the trial level, the State argues officers conducted a protective sweep that justified lifting the flap of Pippin's dwelling.<sup>9</sup> BOA at 25-26. That argument is misplaced because officers were not in the process of arresting Pippin when the officers lifted the flap and intruded into Pippin's private affairs. "While making a lawful arrest, officers may conduct a reasonable 'protective sweep' of the premises for security purposes." State v. Hopkins, 113 Wn. App. 954, 959, 55 P.3d 691 (2002). A protective sweep is a "quick and limited search of premises, *incident to an arrest* and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." Maryland v. Buie, 494 U.S. 325, 327, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990) (emphasis added). "The concept of a protective sweep was adopted to justify the reasonable steps taken by arresting officers to ensure their safety while making an arrest." State v. Boyer, 124 Wn. App. 593, 600, 102 P.3d 833 (2004), review

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<sup>9</sup> Donaldson testified he told Pippin he was going to lift the tarp up to see inside and Pippin said that was okay. CP 39 (FF 53); RP 62. Chavers did not testify to this happening. CP 39 (FF 53). According to Chavers, Donaldson announced he was going to lift the tarp up to see what Pippin was doing and then did so. RP 34. The trial court's written findings of fact do not credit Donaldson's version over Chavers' version on this point, and the court's oral ruling places no reliance on Donaldson's testimony on this point. At the trial level, the State relied exclusively on the "protective sweep" exception, and did not argue consent constituted an exception to the warrant requirement. On appeal, the State likewise does not raise a consent argument.

denied, 155 Wn.2d 1004, 120 P.3d 578 (2005). For this reason, the protective sweep justification does not extend to non-arrest scenarios. Boyer, 124 Wn. App. at 602. Pippin was not being arrested when the officer lifted the flap of the shelter. So the protective sweep exception has no application here.

Nor did exigent circumstances justify the warrantless intrusion. The exigent circumstances exception to the warrant requirement applies where "obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence." State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 386 (2009) (quoting State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). "[D]anger to [the] arresting officer or to the public' can constitute an exigent circumstance." Smith, 165 Wn.2d at 517 (quoting State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983)). Again, at the time police lifted the flap, Pippin was not being arrested. But even assuming the exigent circumstance exception could potentially apply to this situation, it is not established here.

"The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action." State v. Hinshaw, 149 Wn. App. 747, 754, 205 P.3d 178 (2009). "Exigent circumstances involve a true emergency." State v. Cruz, 195 Wn. App. 120, 380 P.3d

599, 602 (2016). The police presented no evidence of a major crisis demanding immediate entry into Pippin's shelter. The circumstances here did not involve violence or threats of violence. His camping ordinance violation, for which he was not being arrested that day, was not a violent offense that had harmed anyone. See Smith, 165 Wn.2d at 518 (recognizing gravity or violent nature of the offense is a factor to consider).

Pippin took "several seconds" to come out of the shelter. CP 38 (FF 42); RP 33, 43, 48.<sup>10</sup> That amount of time does not constitute a "true emergency" necessitating police action to protect officer safety. Pippin was "groggy" and was just waking up when contacted by police. CP 38 (FF 33); RP 32-33, 43-44. Under these circumstances, it is completely understandable that Pippin did not immediately get out of bed and come out of his shelter. Further, "exigent circumstances cannot be created by the police themselves." State v. Hall, 53 Wn. App. 296, 303, 766 P.2d 512

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<sup>10</sup> According to Chavers' report, several seconds passed between hearing Pippin move around and Donaldson lifting the tarp. RP 48. Chavers backed off on his report and waffled on this point in his testimony, saying it was "probably longer than several seconds." RP 48. He couldn't say how long other than it seemed longer than it should have taken, and that it was "more than five, less than 120 seconds." RP 48, 49. Inconsistent with Chavers, Donaldson initially testified they waited five minutes. RP 62. He later testified it was "longer than several seconds." RP 65. But then Donaldson conceded it was just a few seconds between the time Pippin said he was coming out and Donaldson lifting the tarp. RP 65. The court's undisputed finding that a few seconds passed resolves the matter. CP 38 (FF 42).

(quoting United States v. Rosselli, 506 F.2d 627, 629 (7th Cir. 1974)), review denied, 112 Wn.2d 1016 (1989). The police told Pippin to come out of the shelter. And in the course of doing so, he made some noise. That can hardly be surprising. Pippin could not come out without moving. The movement does not support an exigency.

The crux of the matter is that officers were concerned Pippin could be armed with a weapon. Their concern does not qualify as an exigency. Officers had no individualized basis to reasonably believe Pippin was armed. Their concern was based on generalized assumptions that he was armed without any specific information to support a reasonable belief that he was.

Chavers "assumed all the people in that area had weapons." CP 39 (FF 46); RP 35, 47. Chavers had no specific information that the person in the shelter was armed, "but I wasn't going to second-guess, based on the fact that it was starting to get too long." RP 47. Donaldson similarly testified he knew that "multiple homeless people carry homemade weapons to include swords, knives, sticks and clubs," but knew nothing about whether Pippin was so armed. CP 39 (FF 49); RP 62. Regarding Pippin, Chavers testified he had a safety concern, "not necessarily specifically, but certainly that could be what was going on underneath the tarp." RP 36. Chavers further explained "So with regard to who was

under the tent, we didn't know who it was because of the tarp covering the person who wasn't coming out. So I assume as a police officer, so that I don't get hurt, that all people are always armed until otherwise made safe." RP 47. The hypothetical concern that Pippin "*could* have posed a threat if [he] were dangerous applies to every individual contacted by law enforcement." Cruz, 380 P.3d at 603. "[S]uch generalized concerns are insufficient to permit intruding on an individual's constitutionally protected private space." Id.

The State cites United States v. Rigsby, 943 F.2d 631, 637 (6th Cir. 1991) in support of its position that a concern for officer safety justified the intrusion into Pippin's dwelling. BOA at 26. In Rigsby, the court believed a "protective sweep" exigency justified what it called a " cursory inspection" of a tent because law enforcement agents reasonably believed they were in danger. Rigsby, 943 F.2d at 637-38. Agents removing marijuana from an illegal grow operation were shot at by a booby-trapped twelve-gauge shotgun rigged by a trip wire and the defendant was seen with a firearm heading into the woods near where the tent was located. Id. at 633-34.

Rigsby is immediately distinguishable. Officers in Pippin's case had no specific information to support a reasonable belief that anyone inside the shelter posed a danger. No one saw Pippin with a weapon. No

one had shot at the officers or threatened them with a weapon. In fact, no one testified anyone else was even present at the time of the encounter with Pippin.

The trial court concluded "officers had a legitimate concern for their safety," but it did not rise to the level of an exigency that justified invasion of Pippin's privacy interest. RP 97; CP 41 (CL 11). Assuming there was a legitimate safety concern, Pippin agrees it did not justify invasion into Pippin's privacy interest such that it constituted an exception to the warrant requirement. But in an abundance of caution, Pippin challenges the legal conclusion that officers had a legitimate concern for their safety. CP 41 (CL 11); see State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000) (no cross-appeal needed to challenge finding where respondent seeks to affirm trial court decision). For the reasons set forth above, they did not. Some movement in response to a command to come out, a short amount of time passing after the police woke Pippin up, and a conjectural assumption that Pippin was armed do not equal a legitimate concern for safety.

Exceptions to the warrant requirement are jealously guarded "lest they swallow what our constitution enshrines." State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). No exigent circumstance based on officer safety justified the warrantless intrusion into Pippin's shelter by

lifting its flap. For this reason, the plain view exception does not apply because officers were not at a lawful vantage point when they observed the methamphetamine inside the shelter. State v. Kull, 155 Wn.2d 80, 85, 118 P.3d 307 (2005).

The exclusionary rule mandates suppression of evidence obtained as a result of an unlawful search. State v. Garvin, 166 Wn.2d 242, 254, 207 P.3d 1266 (2009). As no exception to the warrant requirement exists, the trial court was correct in suppressing the evidence and dismissing the case.

**4. IN THE EVENT THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, ANY REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.**

The Court of Appeals has discretion to deny a cost bill even where the State is the substantially prevailing party. State v. Sinclair, 192 Wn. App. 380, 386, 388, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016); RCW 10.73.160(1) (the "court of appeals . . . *may* require an adult . . . to pay appellate costs."). The imposition of costs against indigent defendants raises serious concerns well documented in State v. Blazina: "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). The concerns expressed in Blazina are applicable to appellate

costs and it is appropriate for appellate courts to be mindful of them in exercising discretion. Sinclair, 192 Wn. App. at 391.

Pippin is homeless. He qualified for indigent defense services on appeal. CP 56-57. There is a presumption of continued indigency throughout the review process. Sinclair, 192 Wn. App. at 393; RAP 15.2(f). Pippin asks this Court to soundly exercise its discretion by denying any request for appellate costs. See State v. Cardenas-Flores, 194 Wn. App. 496, 521-22, 374 P.3d 1217 (2016) (waiving appellate costs in light of defendant's indigent status, and presumption under RAP 15.2(f) that she remains indigent "throughout the review" unless the trial court finds that her financial condition has improved).

**D. CONCLUSION**

For the reasons set forth, Pippin requests that the trial court's order dismissing the charge be affirmed.

DATED this 9<sup>th</sup> day of November 2016

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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**November 09, 2016 - 2:31 PM**

**Transmittal Letter**

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